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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JIM DAVIS,

11 Petitioner,

12 v.

13 LARRY SMALLS, Warden,

14 Respondent.

Civil No. 09-cv-2922-JLS (POR)

**REPORT AND RECOMMENDATION  
THAT RESPONDENT'S MOTION TO  
DISMISS BE GRANTED**

**[Doc. 12]**

15 **I. INTRODUCTION**

16 On December 28, 2009, Petitioner Jim Davis, a state prisoner proceeding *pro se*, filed a  
17 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) On May 6, 2010,  
18 Respondent filed a Motion to Dismiss the Petition, arguing Petitioner failed to allege a cognizable  
19 claim for federal habeas relief. (Doc. 12.) On May 12, 2010, Petitioner filed an opposition to the  
20 motion, contending the denial of due process gives rise to cognizable claims for federal relief. (Doc.  
21 14.) Upon a thorough review of the record, and in accordance with Local Rule 72.1(d), this Court  
22 **RECOMMENDS** Respondent's Motion to Dismiss be **GRANTED**.

23 **II. FACTUAL AND PROCEDURAL BACKGROUND**

24 In 1996, Petitioner was convicted of three counts of first degree murder with special  
25 circumstances and sentenced to a term of one year plus four consecutive terms of life without the  
26 possibility of parole. (Lodgment 1.)

27 On June 11, 2008, a California Department of Corrections and Rehabilitation maintenance  
28 mechanic conducted an institutional search on cell B-2-246, the cell jointly occupied by Petitioner

1 and Inmate Brown. (Lodgment 2 at 1.) Upon searching the light fixture, the mechanic discovered a  
2 metal weapon measuring six inches in length and sharpened at one end. (Id.) Petitioner was given a  
3 “CDCR 115” Rules Violation for possession of dangerous contraband. (Id.) After the incident,  
4 Petitioner was interviewed by Correctional Officer R. Acevedo, the Investigating Employee  
5 assigned to investigate the Rules Violation. (Id. at 3.) Petitioner declined to make a statement to the  
6 Investigating Officer, but requested that the maintenance mechanic be interviewed and present at his  
7 hearing as a witness. (Id.) He submitted twenty-five questions for the maintenance mechanic, eight  
8 of which were disallowed by the Senior Hearing Officer. (Id. at 3-6.) Petitioner received a copy of  
9 his disciplinary report fifteen days prior to the discovery period and thirty days prior to the  
10 adjudication hearing. (Id. at 7.)

11 On July 17, 2008, Petitioner appeared before Lieutenant G. W. Stratton for adjudication of  
12 his Rules Violation Report. (Lodgment 2 at 7.) The hearing rules and procedures were explained to  
13 Petitioner. (Id. at 7.) He stated that he understood the charges against him and waived his Miranda  
14 rights. (Id.) Petitioner pled not guilty and made a statement in his own defense. (Id.) Though  
15 Petitioner admitted to living in the cell for a long time, he claimed he was “not aware of the item  
16 being in the cell light at all.” (Id.) Based on a preponderance of the evidence submitted at the  
17 hearing, Petitioner was found guilty of possession of dangerous contraband. (Id. at 8.) The Senior  
18 Hearing Officer found the evidence did not substantiate a more serious charge of possession of a  
19 weapon. (Id.) Petitioner was assessed 120 days forfeiture of good time credits, consistent with a  
20 Division “C” offense. (Id.)

21 Petitioner exhausted his administrative remedies by filing two administrative appeals. (Doc.  
22 1 at 37-41.) He argued that the search of his cell was invalid because the cell was not searched prior  
23 to his occupancy. (Doc. 1 at 37-41.) Petitioner further argued that he did not have the tools to  
24 remove the light cover, suggesting that he did not have access to the contraband. (Id.) Petitioner’s  
25 appeals were denied at the Second Level of Appeal and Director’s Level of Appeal. (Id. at 37, 39.)  
26 On February 15, 2009, Petitioner filed an Inmate Request for an Interview, requesting that the B2  
27 Building Officer “check building logs for the exact date [he] was placed in cell B2-246.” (Doc. 1 at  
28 24.) The record indicates that Corrections Officer Morales contacted Central Control and verified

1 that Petitioner was placed in cell B2-246 on August 1, 1998. (Id.)

2 On March 10, 2009, Petitioner filed a Petition for Writ of Habeas Corpus in Imperial County  
3 Superior Court, alleging due process violations regarding the administrative discipline imposed for  
4 his possession of dangerous contraband charge. (Doc. 1 at 14.) The Superior Court determined that  
5 the hearing officer's decision was supported by ponderable evidence and denied his petition. (Id. at  
6 15.)

7 Petitioner then filed a Petition for Writ of Habeas Corpus in the California Court of Appeal,  
8 Fourth Appellate District, Division One. (Doc. 1 at 18.) He argued that there was insufficient  
9 evidence to hold him accountable for the rules violation. (Id.) The Court of Appeal also concluded  
10 that there was "some evidence" to support the administrative decision, and therefore denied his  
11 petition. (Id.)

12 Finally, Petitioner filed a Petition for Writ of Habeas Corpus in the Supreme Court of  
13 California. (Doc. 1 at 20.) The Supreme Court denied Petitioner's petition without comment on  
14 October 22, 2009. (Id.) On December 28, 2009, Petitioner filed the Petition for Writ of Habeas  
15 Corpus currently pending before this Court. (Doc. 1.)

### 16 III. DISCUSSION

17 Petitioner argues that his right to due process was violated for three reasons: (1) Senior  
18 Hearing Officer Lieutenant Stratton filed a document with false information; (2) Prison officials  
19 disregarded CDCR policy and failed to search his cell prior to the date he moved in; and (3) there  
20 was insufficient evidence to sustain a finding of guilt. (Doc. 1.) Respondent moved to dismiss on  
21 the grounds that Petitioner failed to state a cognizable claim for federal relief because the loss of  
22 good time credits assessed at the disciplinary hearing did not effect the fact or duration of  
23 Petitioner's confinement. (Doc. 12-1 at 2.)

#### 24 A. Cognizable Claim for Federal Habeas Relief

25 "Federal law opens two main avenues to relief on complaints related to imprisonment: a  
26 petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871,  
27 Rev. Stat. § 1979, as amended 42 U.S.C. § 1983." Hill v. McDonough, 547 U.S. 573, 579 (2006)  
28 (quoting Muhammad v. Close, 540 U.S. 749, 750 (2004)). The Supreme Court has declined to

1 address whether a challenge to a condition of confinement may be brought by a petition for writ of  
2 habeas corpus. See Docken v. Chase, 393 F.3d 1024, 1028 (9th Cir. 2004). However, the Ninth  
3 Circuit has determined that “habeas jurisdiction is proper where a challenge to prison conditions  
4 would, if successful, necessarily accelerate the prisoner’s release.” Ramirez v. Galaza, 334 F.3d  
5 850, 859 (9th Cir. 2003). Conversely, “habeas jurisdiction is absent, and a § 1983 action proper,  
6 where a successful challenge to a prison condition will not necessarily shorten the prisoner’s  
7 sentence.” Id.

8 Petitioner argues that his petition is cognizable under federal habeas review because the  
9 disciplinary adjudication effected the “level” of his confinement and caused him “extreme harm.” In  
10 addition to a 120-day forfeiture of good time credits, Petitioner’s custody status was downgraded  
11 from A-1-A to A-2-B. (Doc. 14 at 1; Lodgment 2 at 8.) Consequently, he lost his job and suffered a  
12 reduction in telephone and yard privileges. (Doc. 14 at 1-2.)

13 Petitioner’s claims are directed at the conditions of his confinement, rather than the fact or  
14 duration of his confinement. Petitioner was sentenced to a term of one year plus four consecutive  
15 terms of life without the possibility of parole. (Lodgment 1.) As he concedes, the loss of good time  
16 credits has no impact on the duration of his confinement. (Doc. 14 at 4.) Furthermore, the  
17 restoration of Petitioner’s custody level or job would not have an impact on the duration of his  
18 confinement. Accordingly, Petitioner’s claims are not cognizable on federal habeas review and  
19 instead must be raised, if at all, in a civil rights complaint pursuant to 42 U.S.C. § 1983.

20 The Court has discretion to construe Petitioner’s claims as ones brought pursuant to 42  
21 U.S.C. § 1983, and therefore retain jurisdiction over this action. See Willwording v. Swenson, 404  
22 U.S. 249, 251 (1971) (holding that district courts have discretion to construe a habeas petition  
23 attacking conditions of confinement as a complaint under section 1983 despite deliberate choice by  
24 petitioner to proceed on habeas), superseded by statute on other grounds as recognized in Woodford  
25 v. Ngo, 548 U.S. 81, 84 (2006). For the reasons discussed below, however, the interests of justice  
26 do not support the exercise of such discretion because Petitioner has not stated a claim for a  
27 violation of federal due process under either § 2254 or § 1983.

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1 **B. Due Process**

2 Petitioner alleges that his right to due process was violated during his disciplinary  
 3 proceedings. Federal courts “examine procedural due process questions in two steps: the first asks  
 4 whether there exists a liberty or property interest which has been interfered with by the State; the  
 5 second examines whether the procedures attendant upon that deprivation were constitutionally  
 6 sufficient.” Kentucky Dep’t of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (citations  
 7 omitted). State statutes and prison regulations may grant prisoners liberty or property interests  
 8 sufficient to invoke due process protection. Meachum v. Fano, 427 U.S. 215, 223-27 (1976) (citing  
 9 Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (noting that “the touchstone of due process is  
 10 protection of the individual against arbitrary action of government, . . . and the minimum  
 11 requirements of procedural due process appropriate for the circumstances must be observed.”)).

12 In Sandin v. Conner, 515 U.S. 472 (1995), the Supreme Court held that a state-created liberty  
 13 interest under the Due Process Clause of the Fourteenth Amendment may arise from conditions of  
 14 confinement only if the prisoner alleges facts showing a change in his confinement that imposes an  
 15 “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life,”  
 16 or “will inevitably affect the duration of his sentence.” Sandin, 515 U.S. at 484-87; Wilkinson v.  
 17 Austin, 545 U.S. 209, 223 (2005) (“after Sandin, it is clear that the touchstone of the inquiry into the  
 18 existence of a protected, state-created liberty interest in avoiding restrictive conditions of  
 19 confinement is not the language of regulations regarding those conditions but the nature of those  
 20 conditions themselves in relation to the ordinary incidents of prison life.”)

21 Petitioner could establish a liberty interest under Sandin if “the State’s action will inevitably  
 22 affect the duration of his sentence.” Sandin, 515 U.S. at 487. As previously discussed, Petitioner  
 23 was assessed a 120-day forfeiture of good time credits, but the loss of good time credits had no  
 24 impact on the duration of his confinement. To the extent Petitioner relies on the loss of telephone  
 25 and yard privileges, he has not alleged a liberty interest under Sandin because those restrictions are  
 26 not “the type of atypical, significant deprivation [that] might conceivably create a liberty interest.”  
 27 Id. at 486. Sandin involved a prisoner serving a sentence of 30 years-to-life who was not permitted  
 28 to call witnesses at his disciplinary hearing, and who was sentenced to 30 days segregation where he

1 had to remain alone in his cell with the exception of 50 minutes per day for exercise and showers  
 2 during which he wore leg irons and waist chains. Id. at 475. The short loss of telephone and yard  
 3 privileges suffered by Petitioner here are not conditions so significant as to create a liberty interest  
 4 because Petitioner has not alleged that they amount to a “major disruption in his environment” when  
 5 compared to those shared by prisoners in the general population. Id. at 486.

6 Accordingly, Petitioner has failed to allege a protected liberty interest sufficient to bring a  
 7 cognizable due process claim. Because Petitioner has not invoked this Court’s habeas jurisdiction  
 8 under 28 U.S.C. § 2254, and the interests of justice do not support construing Petitioner’s claims as  
 9 ones brought under 42 U.S.C. § 1983, the Court **RECOMMENDS** that Respondent’s Motion to  
 10 Dismiss be **GRANTED**.

#### 11 IV. CONCLUSION

12 This Report and Recommendation will be submitted to the United States District Court judge  
 13 assigned to this case pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file written  
 14 objections with the Court and serve a copy on all parties on or before **January 18, 2011**. This  
 15 document should be captioned “Objections to Report and Recommendation.” Any reply to the  
 16 objections shall be served and filed **no later than 14 days** after being served with the objections.  
 17 *The parties are advised that no extensions of time will be granted for purposes of filing objections.*  
 18 The parties are further advised that failure to file objections within the specified time may waive the  
 19 right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 **IT IS SO ORDERED.**

21 DATED: December 15, 2010

22   
 23 LOUISA S PORTER  
 24 United States Magistrate Judge

25 cc: The Honorable Janis L. Sammartino  
 26 All parties  
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